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T.T., Appellant)	
)	
and)	Docket No. 13-1717
)	Issued: February 26, 2014
)	
DEPARTMENT OF THE ARMY, FIRE)	
EMERGENCY SERVICES, Fort Carson, CO,)	
Employer)	
)	

Case Submitted on the Record

Before:
RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

On July 11, 2013 appellant filed a timely appeal from the Office of Workers' Compensation Programs' (OWCP) decisions dated February 12 and June 12, 2013. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

The issues are: (1) whether appellant has more than a two percent permanent impairment of his right lower extremity; (2) whether OWCP utilized the correct pay rate in issuing appellant's schedule award payment; and (3) whether OWCP properly refused to reopen appellant's case for reconsideration of his claim under 5 U.S.C. § 8128.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

Appellant, a 43-year-old firefighter, injured his right knee on May 19, 1997 when he slipped while working on a wet roof. He filed a claim for benefits, which OWCP accepted for right plantar fibromatosis and right knee strain. The record indicates that appellant did not stop work.

In a May 21, 2010 report, received by OWCP on December 22, 2010, Dr. Ken A. Stone, Board-certified in occupational medicine, rated a two percent impairment of the right lower extremity pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (sixth edition) (A.M.A., *Guides*). He stated that appellant had sustained multiple work-related injuries to the anterior region of the right knee which caused deep joint pain with flexion. On examination Dr. Stone stated that appellant had ongoing moderate stiffness, intermittent mild swelling, and moderate pain with walking on flat surfaces and going up and down stairs. He advised that appellant had palpation tenderness in the joint line, with the medial being greater than the lateral. Dr. Stone noted that appellant underwent a magnetic resonance imaging (MRI) scan on January 12, 2010 which revealed a grade 2-3 patellofemoral chondromalacia involving the patella and trochlea, with mild medial femoral condyle cartilage changes were present. He stated that x-rays of the right knee did not reveal any cartilage intervals less than four millimeters and showed no significant difference from the left side.

Dr. Stone stated that, under Table 16-3, Knee Regional Grid, Lower Extremity Impairments, at page 509 of the A.M.A., *Guides*;² the section pertaining to contusion or other soft tissue lesion impairments, appellant's right knee condition yielded a class 1 rating for muscle/tendon with palpation findings in the right knee. He stated that the diagnosis-based impairment for patellofemoral or joint arthritis of the knees was class 0, since the cartilage intervals by x-ray were not sufficiently decreased; he chose the diagnosis of tendinitis, class 1 mild problem, for rating appellant's knee impairment. Using the Adjustment Grid, Functional History, at Table 16-6, page 516 of the A.M.A., *Guides*,³ Dr. Stone found that appellant had a grade modifier of two for functional history based on his score of 37 for a daily activities lower limb questionnaire; with regard to physical examination, he assigned a grade modifier of one, for a mild problem, for minimal palpatory findings, consistently documented, without observed abnormalities, pursuant to Table 16-7, Section 16.3b, page 517 of page 509 of the A.M.A., *Guides*, the tables pertaining to rating lower extremity impairments based on physical examination. Dr. Stone found a grade modifier of zero for clinical studies, a mild problem pursuant to Table 16-8, page 519 of the A.M.A., *Guides*⁴ based on clinical studies.

Based on the above findings Dr. Stone applied the net adjustments from functional history, physical examination and clinical studies, with grade modifiers of two plus zero plus

² A.M.A., *Guides* 509.

³ *Id.* at 516.

⁴ *Id.* at 519.

one, at the net adjustment formula at page 521 of the A.M.A., *Guides*. This yielded a diagnosis of class 1, mild problem, for a remaining C, a two percent lower extremity impairment.⁵

In an April 20, 2011 report, an OWCP medical adviser rated a two percent impairment of the right lower extremity for tendinitis, pursuant to the A.M.A., *Guides*. He concurred with Dr. Stone's findings regarding the grade modifiers for functional history and physical examination. However, the medical adviser found that the grade modifier for clinical studies was one, for mild findings based on the January 12, 2010 MRI scan, which showed a grade 2-3 patellofemoral chondromalacia involving the patella and trochlea and mild medial femoral condyle cartilage changes. He advised that these findings showed mild prepatellar and prepatellar tendon subcutaneous edema. Using the Adjustment Grid, Functional History, at Table 16-6, page 516 of the A.M.A., *Guides*,⁶ the medical adviser found that appellant had a grade modifier of one for functional history based on his score of 37 for the daily activities lower limb questionnaire; with regard to physical examination, he assigned a grade modifier of one, for a mild problem, for minimal palpatory findings, consistently documented, without observed abnormalities, pursuant to Table 16-7, Section 16.3b, page 517 of page 509 of the A.M.A., *Guides*, the tables pertaining to rating lower extremity impairments based on physical examination. He found a grade modifier of one for clinical studies, a mild problem pursuant to Table 16-8, page 519 of the A.M.A., *Guides*⁷ based on the January 12, 2011 MRI scan, which showed grade 2-3 patellofemoral chondromalacia involving the patella and trochlea and mild medial femoral condyle cartilage changes, with mild prepatellar and prepatellar tendon subcutaneous edema. The medical adviser believed that these changes, as shown by MRI scan, equated to a grade modifier of one, for mild findings.

Based on the above findings OWCP's medical adviser compared the net adjustments from functional history, physical examination and clinical studies, with grade modifiers of one, two and one, at the net adjustment formula at page 521 of the A.M.A., *Guides*. This moved the grade one to the right of class C, a mild problem, for a remaining grade of D, for a two percent lower right extremity impairment.⁸

In pay rate memorandum dated December 28, 2011, OWCP determined that appellant had a net, overall weekly pay rate of \$732.45 based on the effective pay rate of May 21, 2010. It arrived at this figure by finding that his biweekly base pay was \$1,035.27, based on dividing the date-of-injury annual salary, \$26,917.00 (as indicated on his Form CA-7) by 26. OWCP then calculated appellant's standard premium pay; multiplying \$1,035.27 times 22 percent for a non-Sunday workweek, and times 25 percent for Sunday work. It found that this totaled \$258.82 in premium pay, which it added to his biweekly pay and premium pay for a total biweekly pay of \$1,294.09. OWCP calculated his overtime under the Fair Labor Standards Act (FLSA) by taking his regular hourly rate of \$8.99, plus 0.5 for overtime pay, and multiplying this times 38 hours in overtime, for a total of \$170.81 in FLSA overtime pay, which it added to his biweekly pay of

⁵ *Id.* at 511.

⁶ *Id.* at 516.

⁷ *Id.* at 519.

⁸ *Id.* at 521.

\$1,294.09 for a total biweekly pay rate of \$1,464.90. It then divided that number by two to arrive at the weekly pay rate of \$732.45.

By decision dated January 3, 2012, OWCP granted appellant a schedule award for a two percent permanent impairment of the right lower extremity for the period May 21 to June 30, 2010, for a total of 5.76 weeks of compensation. Appellant was paid \$549.34 per week based on his weekly pay rate of \$732.45, times the compensation rate of 75 percent.

By letter dated January 15, 2012, appellant requested a review of the written record. He contended that the effective pay rate of his schedule award, \$549.34, was not correct. Appellant noted that OWCP based his pay rate on his weekly pay as of the date of injury, \$732.45, times the compensation rate of 75 percent when the award should have been based on his earnings as of May 21, 2010, the date of maximum medical improvement.

Appellant argued that because his entire career was spent in a covered position as a federal firefighter, his pay rate was governed by the pay regulations for federal firefighters. He noted that the period of the award was May 21 to June 30, 2010; during this time period he worked 72 hours per week, 144 hours a pay period. As a firefighter, appellant was compensated for regular pay for 106 hours, or 53 hours a week, times his hourly rate of \$23.65, which amounted to \$1,253.45. He added 19 hours of overtime, which when multiplied by his basic overtime rate of \$35.48 equaled \$674.12, for a total weekly pay rate of \$1,927.57. Appellant argued that, when this total is multiplied by the compensation rate of 75 percent, it amounts to the proper schedule award payment based on a weekly rate of \$1,445.68. He attached a leave and earning statement for the pay period ending August 26, 2010, indicating that his adjusted basic pay was \$65,190.00.

In an April 3, 2012 statement, the employing establishment indicated that appellant's overtime pay was included in his adjusted pay of \$65,190.00.

By decision dated April 23, 2012, an OWCP hearing representative affirmed the January 3, 2012 schedule award decision. She found, however, that while OWCP correctly determined that appellant was entitled to payment of the award based on the date-of-injury pay rate, it incorrectly calculated the weekly pay rate, resulting in an incorrect schedule award payment. With regard to appellant's pay rate contention, the hearing representative found that appellant reached maximum medical improvement as of May 21, 2010. She stated that appellant's annual pay rate on the date of injury, April 21, 1997, was \$26,917.00, as indicated by the employing establishment, and \$64,528.00, at the time he stopped work on May 21, 2010, as indicated on the Form CA-7s completed by the employing establishment.

OWCP calculated the effective pay rate of the schedule award based on the date-of-injury pay rate. The hearing representative noted that there had been no recurrence, surgery or prior period of temporary total disability and that the consumer price index (CPI) waiting period was effective the date of maximum medical improvement.

The hearing representative therefore found that OWCP properly determined that the schedule award was payable using appellant's date-of-injury pay rate, effective as of the date of maximum medical improvement. She then calculated appellant's salary by relying on the

Federal Firefighters Overtime Pay Reform Act of 1998. OWCP calculated appellant's overtime rate as \$166.63, whereas the correct calculation, based on an hourly rate of \$8.77 times 1.5, times 38 hours, amounted to an FLSA overtime rate of \$499.89. This overtime rate, \$499.89, when added to his biweekly pay of \$1,762.92 and divided by 2, amounts to the proper, corrected weekly pay rate of \$881.46.

Therefore, OWCP's hearing representative determined that appellant was entitled to an amended payment, for the period of the schedule award, at the higher pay rate of \$881.46. She set aside the January 3, 2012 pay rate determination and remanded for recalculation of appellant's pay rate, based on the corrected weekly pay rate of \$881.46.

By letter dated November 26, 2012, appellant requested reconsideration. He stated that the pay regulations for Federal Firefighters, 5 U.S.C. §§ 5545b, 5548, 5553, included the 2009 Federal Firefighter Pay Chart published by the Office of Personnel Management and by Average Salary Report. Appellant contended that these documents show that the correct adjusted basic pay had not been used. He further argued that he was actually a GS-9, Step 9 employee. Appellant reiterated his contention that his schedule award should have been paid in the amount of \$1,927.57.

By decision dated February 12, 2013, OWCP denied modification. It stated that, as the hearing representative found, the rate of pay for schedule award purposes is the highest rate which satisfies the terms of section 8101(4). OWCP noted that Section 8101(4) of FECA defines monthly pay for purposes of computing compensation benefits as follows: The monthly pay at the time of injury (DCI) or the monthly pay at the time disability begins (DDB) or the monthly pay at the time compensation disability recurs (DOR), if recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater. OWCP determined that, as appellant did not establish a period of disability or recurrence, the date-of-injury pay was his only entitlement. Because his weekly pay rate was based on his earnings at the time of injury on April 21, 1997, OWCP found that he was not entitled to a higher pay rate.

By letter dated March 11, 2013, appellant requested reconsideration. He reiterated his contention that the date-of-injury pay rate was not the correct date to be used for compensation, that the date of maximum medical improvement, May 21, 2010, was the correct date to be used for the benefit calculation. Appellant also asserted that his impairment had increased since the January 3, 2012 schedule decision.

By decision dated June 12, 2013, OWCP calculated appellant's schedule award based on the calculations and instructions outlined in its April 23, 2012 decision.

By decision dated June 12, 2013, OWCP denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require OWCP to review its prior decision.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA⁹ and its implementing regulations¹⁰ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.¹¹ The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment.¹²

ANALYSIS -- ISSUE 1

In the instant case, OWCP accepted the condition of right knee sprain. Based on this condition, it granted appellant a schedule award totaling a two percent impairment of the right lower extremity, relying on the ratings from Dr. Stone and its medical adviser.

The Board notes that the A.M.A., *Guides* directs examiners to rate diagnosis-based impairments for the lower extremities pursuant to Chapter 16, which states at page 497, Section 16.2a that impairments are defined by class and grade.¹³ In accordance with this section the examiner is instructed to utilize the net adjustment formula outlined at pages 521-22 of the A.M.A., *Guides*,¹⁴ to obtain the proper impairment rating. Dr. Stone related his findings to the applicable tables and figures of the A.M.A., *Guides*. He found that appellant had a two percent impairment of the right lower extremity based on the Knee Regional Grid, Lower Extremity Impairments at Table 16-3, page 509 of the A.M.A., *Guides*. Dr. Stone applied the section pertaining to contusion or other soft tissue lesion impairments, finding that the section pertaining to contusion or other soft tissue lesion impairments, appellant's right knee condition yielded a class 1 rating for tendinitis, a mild problem. Using the Adjustment Grid, Functional History, at Table 16-6, page 516 of the A.M.A., *Guides*,¹⁵ he found that appellant had a grade modifier of two for functional history based on his score of 37 for a daily activities lower limb questionnaire; with regard to physical examination, he assigned a grade modifier of one, for a mild problem, for minimal palpatory findings, consistently documented, without observed abnormalities, pursuant to Table 16-7, Section 16.3b, page 517 of the A.M.A., *Guides*. While OWCP's medical adviser

⁹ 5 U.S.C. § 8107.

¹⁰ 20 C.F.R. § 10.404. Effective May 1, 2009, OWCP began using the A.M.A., *Guides* (6th ed. 2009).

¹¹ *Id.*

¹² *Veronica Williams*, 56 ECAB 367, 370 (2005).

¹³ A.M.A., *Guides* 497.

¹⁴ *Id.* at 521-22.

¹⁵ *Id.* at 516.

concurred with Dr. Stone's findings on these two elements of rating appellant's right knee impairment, he used the January 12, 2011 MRI scan to derive a grade modifier of one for clinical studies pursuant to Table 16-8, page 519 of the A.M.A., *Guides*.¹⁶ He noted that the MRI scan demonstrated grade 2-3 patellofemoral chondromalacia involving the patella and trochlea and mild medial femoral condyle cartilage changes, with mild prepatellar and prepatellar tendon subcutaneous edema. OWCP's medical adviser opined that these changes, as shown by MRI scan, equated to a grade modifier of one, for mild findings. He then compared the net adjustments from functional history, physical examination and clinical studies, with grade modifiers of one, two and one, at the net adjustment formula at page 521 of the A.M.A., *Guides*. This moved the grade one to the right of class C, a mild problem, for a remaining grade of D, for a two percent lower extremity impairment.

Based on the above findings OWCP's medical adviser compared the net adjustments from functional history, physical examination and clinical studies, all with grade modifiers of one, at the net adjustment formula at page 521 of the A.M.A., *Guides*. This yielded a diagnosis of class 1, mild problem, for a grade D, a two percent lower extremity impairment. Based on OWCP's medical adviser report, OWCP determined that appellant had a two percent impairment of the right leg, as he calculated this rating based on the applicable protocols and tables of the sixth edition of the A.M.A., *Guides*. As noted above, OWCP's medical adviser chose to rate his diagnosis-based impairment based on appellant's accepted arthritis condition, rather than according an impairment rating based on the two surgeries he underwent to repair his torn medial meniscus and damaged skin. The Board notes that, pursuant to Table 16-3, based upon the diagnosis of meniscal tear, appellant's meniscal repair, rated as a class D, would also result in a default rating of two percent permanent impairment of the right knee.

Therefore, as Dr. Stone and OWCP's medical adviser provided the only medical reports which included an impairment rating in accordance with its applicable protocols and tables, based on appellant's accepted conditions, OWCP properly granted a schedule award for a two percent impairment of the right lower extremity in its January 3, 2012 decision.

Appellant has submitted no other medical evidence indicating that he has an impairment greater than two percent to his right leg. The Board will affirm OWCP's June 12, 2013 decision.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

LEGAL PRECEDENT -- ISSUE 2

Section 8107 of FECA provides that compensation for a schedule award shall be based on the employee's monthly pay.¹⁷ For all claims under FECA, compensation is to be based on the pay rate as determined under section 8101(4), which defines monthly pay as:

¹⁶ *Id.* at 519.

¹⁷ 5 U.S.C. § 8107.

The monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States.

Under the Federal Firefighters Overtime Pay Reform Act of 1998,¹⁸ in determining the rate of pay for firefighters with regular tours of duty which generally consists of 24-hour shifts, pay rate for compensation purposes is determined as follows:

“(a) Annual salary/-2756 (53 hours of regular pay per week x 52 weeks) = firefighter hourly rate.

“(b) Firefighter hourly rate x 106 hours = biweekly base pay.

“(c) Firefighter hourly rate x 1.5 = firefighter overtime rate.

“(d) Firefighter overtime rate x number of hours in regular tour in excess of 106 hours = biweekly firefighter overtime.

“(e) Biweekly base pay plus biweekly firefighter overtime/2 = weekly pay rate.

“Most 24-hour shift firefighters have a regular biweekly tour of 144 hours (six 24 hours shifts) consisting of 106 regular hours and 38 firefighter overtime hours; thus 38 hours (144-106) would be used in step (d) above.”

Although overtime pay is normally not included in determining pay rate for compensation purposes under section 8114 of FECA, section 5545(b) was amended to establish that overtime pay for firefighters under that section shall be included in any computation of pay under section 8114.¹⁹ OWCP’s procedures established a formula for determining pay rate for these firefighters, using a base pay of 106 biweekly work hours and an overtime rate of 38 hours above the 106 hours.²⁰

ANALYSIS -- ISSUE 2

The Board has duly reviewed the case record and concludes that OWCP properly determined appellant’s pay rate for computation of his schedule award.

Appellant contends that his pay rate for the schedule award based on the right lower extremity impairment should be calculated based on a higher pay rate. He states that the award should be based on his earnings as of May 21, 2010, the date of maximum medical improvement. The Board notes that in all situations, including those involving a schedule award, compensation is to be based on the pay rate either at the time of injury, the rate at the time disability for work begins, or the rate at the time of recurrence of disability of the type described in section 8101(4)

¹⁸ 5 U.S.C. § 5545(b).

¹⁹ *Id.* at § 5545(b)(d)4.

²⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.8(d) (August 2012). *See also* G.W., Docket No. 12-1171 (October 25, 2012).

of FECA, whichever is greater.²¹ In this case, OWCP noted that appellant's pay rate was based on his date of injury, a traumatic injury, and that he did not sustain any recurrence or period of disability. It calculated his award based on pay rate derived from his Form CA-7 and his leave and earnings statement. OWCP also relied on the fact that his pay rate was based on his tour of duty as a firefighter and used the method outlined in the regulations for determining firefighters' pay.²² As noted above OWCP's hearing representative found in her April 23, 2012 decision that appellant's schedule award pay rate was determined by dividing the date-of-injury annual salary, \$26,917.00 to determine an hourly rate of \$9.77, which was then multiplied by 106 hours to equal a biweekly rate of \$1,263.03. She calculated the overtime pay by OWCP through the proper FLSA overtime method; using an hourly rate²³ of \$8.77 times 1.5, times 38 hours, which yielded an FLSA overtime rate of \$499.89. This overtime rate, \$499.89, when added to his biweekly pay of \$1,762.92 and divided by 2, amounted to the proper, corrected weekly pay rate of \$881.46.

The Board finds that OWCP properly applied section 8114(d)(3) and the FECA Procedure Manual to determine appellant's pay rate for compensation purposes based on his date of injury for a traumatic injury. OWCP complied with its procedure by obtaining information from the employing establishment and appellant concerning these factors. After considering the above-noted factors, it properly determined that this pay rate was the most appropriate pay rate to use for appellant's June 13, 2013 schedule award.

The terms of FECA are specific as to the method and amount of payment of compensation; neither OWCP nor the Board has the authority to enlarge the terms of FECA or to make an award of benefits under any terms other than those specified in the statute. For the reasons detailed above, OWCP used the correct pay rate to calculate appellant's benefits.

LEGAL PRECEDENT -- ISSUE 3

Under 20 C.F.R. § 10.606(b), a claimant may obtain review of the merits of his or her claim by showing that OWCP erroneously applied or interpreted a specific point of law; by advancing a relevant legal argument not previously considered by OWCP; or by submitting relevant and pertinent evidence not previously considered by OWCP.²⁴ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.²⁵

²¹ See *Charles P. Mulholland*, 48 ECAB 604 (1997).

²² Federal (FECA) Procedure Manual, Part 2 -- Determining Pay Rates, *Kinds of Appointments and Tours of Duty*, Chapter 2.900.3(g)(2)(a) "Firefighters who normally work three 24-hour shifts per week. Most firefighters who work a 24-hour shift have a regular bi-weekly tour of 144 hours (six 24-hours shifts), consisting of 106 regular hours and 38 "firefighter overtime" hours." (March 2011). This section appears to be derived from the Federal Firefighters Overtime Pay Reform Act of 1998.

²³ Based upon the total regular biweekly pay for 144 hours of \$1,263.03.

²⁴ 20 C.F.R. § 10.606(b). See generally 5 U.S.C. § 8128(a).

²⁵ *Howard A. Williams*, 45 ECAB 853 (1994).

ANALYSIS -- ISSUE 2

In the present case, appellant has not shown that OWCP erroneously applied or interpreted a specific point of law; nor has he advanced a relevant legal argument not previously considered by OWCP. The March 11, 2013 letter from appellant merely reiterates his contentions that he was entitled to a greater schedule award and that OWCP used the incorrect pay rate in calculating his schedule award. This argument is therefore cumulative and repetitive. Appellant's reconsideration request failed to show that OWCP erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by OWCP. The OWCP did not abuse its discretion in refusing to reopen appellant's claim for a review on the merits.

CONCLUSION

The Board finds that appellant has more than a two percent impairment to his right lower extremity. The Board finds that OWCP properly determined the pay rate for his schedule award. The Board finds that OWCP properly refused to reopen appellant's case for reconsideration on the merits of his claim under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the February 12 and June 12, 2013 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 26, 2014
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board